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No. 88-953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHENIX FEDERAL SAVINGS & LOAN ASSOCIATION, F.A.,
Petitioner,

vs.

SHEARSON LEHMAN HUTTON, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITIONER'S REPLY BRIEF

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Shearson's Brief in Opposition (hereinafter "Opp.") demonstrates that certain propositions are uncontroverted. Phenix Federal's post-verdict motion to alter or amend the judgment under Fed.R.Civ.P. 59 did not implicate the jury's fact-finding in any way. Shearson does not dispute that the propriety of the offset was solely a matter of law for the court; a post-verdict decision not to offset the damage award would not have necessitated a new trial. Nor does Shearson dispute that the trial court refused to consider the Rule 59 challenge to the offset because Phenix Federal failed to object to Instruction No. 41. The trial court concluded that, by virtue of Fed. R. Civ. P. 51, this failure to object precluded post-verdict review.

There is also no question that the Eighth Circuit concluded that this was indeed the effect of Rule 51. The court of appeals observed:

> [Phenix] makes legal arguments against the offset of the bond proceeds against its award, but we do not need to reach them, for Phenix failed to object to the jury instruction it finds offensive and has therefore failed to preserve the alleged error for review.

(App. A-10). The Eighth Circuit addressed and rejected the argument that Rule 51 waiver standards were inapplicable.

> Phenix argues that it appeals not from the instruction, but from the Court's action in entering judgment for an amount less than the verdict. The Court told the jury that it, the Court, would reduce the jury's damages verdict by $6.5 million. This, the argument runs, was not an explanation of the law made to guide the jury's deliberation, but a declaration of the court's intent to offset the jury's verdict; thus it was not a "jury instruction."
>
> We reject this argument. The instruction explained the law applicable to the case, as all jury instructions do. The Court instructed the jury that the law in this case required the offset, regardless of what it found Phenix's damages to be. If Phenix disagreed with this statement of applicable law, it should have objected to the instruction.

(App. A-10 n.2).

The flaw in the Eighth Circuit's reasoning is apparent. Had the district court not informed the jury of the offset — rather than announce the offset and then instruct the jury to ignore it — the Eighth Circuit's logic suggests the propriety of the offset would have been reviewable under Rule 59. Yet there is no coherent rationale, rooted in considerations of judicial efficiency or substantial fairness, to distinguish the two situtations.

Shearson does not dispute that the Eighth Circuit held that Rule 51 bars post-verdict review under Rule 59 of a pure question of law. Nor does it attempt to defend the logic of that holding. Rather Shearson propounds the novel proposition that the "Court of Appeals considered the merits independently of the jury instructions and ruled on the basis of the applicable state law" (Opp. i) — despite the court's statement that it did not have to do so. This eleventh hour revisionism is belied both by what the Eighth Circuit said and what it did not say.

The Eighth Circuit clearly held that because of the failure to object to Instruction No. 41, it did not have to reach Phenix Federal's "legal arguments against the offset of the bond proceeds against its award." The court did not cite, let alone analyze, any authority bearing on the propriety of the offset. In announcing there was no "plain error," the court of appeals characterized Instruction No. 41 as "arguable" as opposed to "egregiously wrong." Clearly the court of appeals elected not to settle this "argument" because, under Fed.R.Civ. P. 51, it concluded that it had no obligation to do so.

If an appellate court gives a legal proposition plenary consideration, it is either "right" or "wrong." It is apparent that the Eighth Circuit did not give plenary consideration to Phenix Federal's legal arguments against the offset. Therefore, this case squarely presents the issue whether Rule 51 precludes plenary reconsideration by the trial court of a pure question of law that is wholly independent of the jury's fact-finding.[1]

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[1] Shearson predicates its argument that the Eighth Circuit gave plenary consideration to the legal propriety of the offset on the court of appeals' statement: "[U]nder the applicable law Phenix was entitled to whatever it had lost on the loans to Van Buren County Alcohol, plus what it would lose on the letter of credit in the MTJ deal, less what it had received from that deal, $6.5 million." (App. A-11). As is obvious from footnote 2 of the opinion, which is quoted on page 2 *supra,* the court used the phrase "applicable law" to refer to the law articulated in the jury instructions. Indeed, if the court had concluded that Instruction No. 41 was correct, it would have made little sense to characterize it as "arguable."

The second proposition that dominates Shearson's response is its contention that "there is no confusion or lack of uniformity among the federal courts as to how the failure to object to jury instructions should affect post-trial motions." Yet Shearson fails to confront the obvious conflict between this case and the Sixth Circuit's *Solomon v. United States*, 276 F.2d 669 (6th Cir.), *cert. denied*, 364 U.S. 890 (1960) — let alone the hesitant and ambiguous articulations of the "law of the case" doctrine found in cases such as *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471 (10th Cir. 1985), and *Rakovich v. Wade*, 850 F.2d 1180 (7th Cir.), *cert. denied*, 109 S.Ct. 497 (1988).

The Sixth Circuit in *Solomon* reached a purely legal contention raised by a motion for new trial that had not been raised previously, even though that argument was inconsistent with jury instructions to which there had been no objection. Shearson lamely responds that the Sixth Circuit, after giving plenary consideration to the argument, did not reverse. But what is significant is that the Sixth Circuit gave plenary consideration to the argument even though it was not raised prior to the motion for new trial and was inconsistent with an unexcepted-to jury instruction. Since the question was purely one of law and would not necessitate a new trial however it was decided, the Sixth Circuit did not find Rule 51 a bar to post-verdict review.

Shearson suggests that when parties fail to object to pertinent jury instructions, lower courts uniformily refuse to consider even pure questions of law on post-verdict motions unless those questions were first raised in a motion for directed verdict. But as *Solomon* indicates, any such rule is far from universal. Indeed, the Ninth Circuit has taken the position that it will consider issues raised for the first time *on appeal* "when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *In re Wind Power Systems, Inc.*, 841 F.2d 288, 290 n.1 (9th Cir. 1988); *see Romain v. Shear*, 799 F.2d 1416, 1419 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 2183 (1987). The Seventh Circuit has adopted an intermediate position.

> In *Benson v. Allphin*, 786 F.2d 268 (7th Cir. 1986), we held that "something less than a formal motion for a directed verdict" suffices to preserve a party's right to seek a judgment n.o.v. based solely on a question of law. *Id.* at 274. The purpose of the directed verdict requirement, we explained, is to preserve a party's Seventh Amendment right to a jury, and to allow a party to remedy any deficiencies in its proof before the case goes to the jury. *Id.* at 273. As we noted in *Benson*, neither of these concerns is implicated when the basis of the judgment n.o.v. motion is a pure question of law, which is outside the province of the jury.

Kladis v. Brezek, 823 F.2d 1014, 1017 (7th Cir. 1987).

Shearson's suggestion that a directed verdict motion arguing the impropriety of the offset was necessary to preserve that issue for post-verdict review also confuses the requirements of Fed.R.Civ.P. 50 with those of Rule 59. Phenix Federal's motion was not an attack on the sufficiency of the evidence. As pointed out in the Petition, there is no directed verdict precondition to a motion for new trial or to alter or amend the judgment under Rule 59. "[S]uch a requirement should not be read into Rule 59 to preclude a just determination of the merits of a controversy because of a procedural mistake." 6A Moore's Federal Practice ¶59.04[5] at 59-22.

Shearson's contention that Phenix Federal failed to apprise the trial court in any way of its position on the offset and actually invited any error is refuted by the record. Phenix Federal before and during the liability phase maintained that the MTJ bond transaction was irrelevant. *See, e.g.*, Petition for Writ of Certiorari at 6. Shearson responded that the bond transaction made Phenix Federal "whole" and, indeed, constituted grounds for directing a verdict on its liability to Phenix Federal. The district court concluded that the MTJ bond transaction was relevant to the issue of damages, but not grounds for granting a directed verdict to Shearson on liability. So during the damage

phase opening statements, both sides referred to the transaction.[2] There was no reference to any potential future losses under the letter of credit. Shearson, in its damages opening statement, contended that because of the MTJ bond transaction, Phenix "has basically received full payment on its loan." Both sides submitted proposed damage instructions, none of which referred either to the $6.5 million offset or consequential damages stemming from the MTJ letter of credit. Phenix Federal's principal damage witness identified the specific items of damage Phenix Federal was seeking to recover. There was no mention of consequential damages stemming from future losses under the letter of credit. Indeed, as Shearson argued below, Phenix Federal did not present any evidence regarding the future prospects of the plant.

This hardly constitutes a "strategy" to recover future losses under the letter of credit. That element of "consequential" damages was introduced by the trial court, not by Phenix Federal, as the court wrestled with an unusual damage issue. His solution was to put the burden on Phenix Federal to prove what it would lose on its MTJ letter of credit — as a separate item of consequential damage — and then subtract $6.5 million from the total damages awarded Phenix. Thus it was in closing argument, with its evidentiary case closed, that Phenix Federal's counsel sought damages in the amount of Phenix Federal's exposure under the letter of credit — with simply a reference to the bond issue being in default and without any reference to the future prospects of the plant.

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[2] Thus Shearson's assertion that "Phenix was the first party to bring the MTJ bond transaction to the jury's attention" is misleading. (Opp. 3). Phenix Federal consistently argued against the relevance of the MTJ bond transaction prior to the damage phase of the case. It was only after the trial court indicated evidence of the transaction would come in during that phase that Phenix Federal's counsel mentioned it in his damages opening statement in anticipation of Shearson's argument that Phenix Federal had been made "whole" as a result of its participation in the bond transaction.

Shearson makes much of statements made by counsel after the trial court crafted Instruction No. 41. But as a logical matter, there is no meaningful distinction between vocal assent and assent by silence. The issue remains: Does Rule 51 bar post-verdict review of a pure question of law that does not implicate the jury's fact-finding? All the "invited error" cases cited by Shearson involve situtations where the appellate court was asked to upset a finding made by the jury. That is not what Phenix Federal asked for in its Rule 59 motion.

Even if there had been a "strategy" to recover future losses under the letter of credit — which was clearly not the case — the only burden Phenix Federal would have assumed was to prove the extent of those losses. The jury could have considered the $6.5 million, which was part of the MTJ transaction, in evaluating whether Phenix Federal would ultimately suffer a net loss on that transaction. But the burden should have been Shearson's to prove that the $6.5 million was a reasonably certain sum[3] from a non-collateral source that should properly offset *other* items of damage — *e.g.*, the amounts of the original loan and subsequent advances and the costs of administrative supervision of the ethanol plant. There was no way Shearson could prove the $6.5 million was a reasonably certain offset without proving the plant would be successful through 2004,

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[3] Shearson's contention that Phenix Federal did not argue in its Rule 59 motion that the $6.5 million "was not reasonably certain" reads that motion very narrowly. (Opp. 6 n.5). The entire thrust of the motion was that the plant was not likely to succeed and at most the $6.5 million would allow Phenix Federal to spread its losses over time.

Shearson's assertion that the $6.5 million repaid VBCA's indebtedness to Phenix Federal (Opp. 3) is incorrect. The $6.5 million did not discharge the VBCA debt. It was still carried on the books of Phenix Federal at the time of trial. Given Phenix Federal's corresponding exposure under the letter of credit and posting of collateral, Phenix Federal's auditors treated the $6.5 million as a borrowing by Phenix Federal.

that the bonds would be paid off with plant revenues, and that Phenix Federal, therefore, would not have to honor its letter of credit.

This brings us to the third question presented in the Petition: If a jury instruction to which there is no objection misallocates the burden of proof on an important issue, is the misallocation "plain error" or is appellate review precluded by Fed. R. Civ. P. 51? The conflict in the lower courts on this issue is patent and Shearson's only response is to ignore it. The Second, Third, Fourth, Fifth, and Sixth Circuits have all held that misallocation of the burden of proof on an important issue is "plain error." On the other hand, the First Circuit by its own admission has never found plain error in a civil case, and the Seventh[4] and Ninth Circuits reject any application of the plain error standard in civil cases.

If the offset in this case was improper either because proceeds from the MTJ bond transaction constituted a collateral source payment or because any net benefit from the MTJ transaction was too speculative to constitute an offset, the effect of the error was devastating. It reduced a $5.1 million judgment to zero. The implications are equally dramatic if the offset was proper in theory, but Shearson should have borne the risk of any uncertainty about its amount by proving the ethanol plant would be successful through the year 2004. As Shearson's counsel conceded in closing argument, the burden of proving the plant's prospects was, for all practical purposes, impossible to carry.

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[4] If there was any ambiguity in the Seventh Circuit's position, it was eliminated by *Deppe v. Tripp*, 863 F.2d 1356, 1362 (7th Cir. 1988), where the court held "that in civil cases a plain error doctrine is not available to protect parties from erroneous jury instructions to which no objection was made at trial."

Procedural rules should not become empty formalisms or vary with the predilections of each forum. This case affords the Court an opportunity to infuse some sorely needed analytical content into the concepts of "waiver" and "plain error" in civil cases.

Respectfully submitted,

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